

February 8, 2024

Presiding Officer Carol Foelak
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Negative Option Rule (16 CFR Part 425) (Project No. P064202)

Dear Presiding Officer Foelak:

In April 2023, the Federal Trade Commission (“FTC” or “Commission”) proposed amendments to its Negative Option Rule that would formalize prohibitions on pervasive unfair and deceptive business practices. The proposed amendments include key protections for consumers, including a requirement that subscription cancellation be as easy as signing up.

Industry representatives have requested that the Commission conduct “informal hearings” in this rulemaking. On January 31, Hearing Officer Foelak ordered that “any interested persons may submit additional comments by February 9, 2024.” Pursuant to that Order, Consumer Federation of America, the National Consumers League, and the National Consumer Law Center (on behalf of its low-income clients) submit these comments.

I. Unfair and Deceptive Negative Option Practices are Harmful to Consumers.

Unfair and deceptive negative option practices have extracted billions of dollars from Americans, often without the consumers’ knowledge.¹ On average, consumers pay two-and-

¹ “Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements,” *Better Business Bureau*, December 12, 2018. <https://www.bbb.org/article/investigations/18929-subscription-traps-and-deceptive-free-trials-scam-millions-with-misleading-ads-and-fake-celebrity-endorsements>

a-half times what they originally estimated on monthly subscriptions, likely due to the lack of adequate notice from sellers.² Once an individual becomes aware of how much they spend and attempts to cancel a negative option plan, they often encounter burdensome cancellation processes. One survey found that more than half of respondents reported an average of three months to cancel unwanted recurring payments.³ That same study discovered that 71% of individuals lost more than \$600 a year in unwanted subscriptions.

The harms from these anti-consumer practices are apparent, and in response the federal government has taken many actions to combat them. In 2010, Congress enacted the Restore Online Shoppers Confidence Act (“ROSCA”), which required “simple mechanisms” for subscription cancellations.⁴ For decades, the Commission has used the FTC Act, ROSCA, the existing Negative Option Rule (or Prenotification Plan Rule), and the Telemarketing Sales Rule to enforce consent, disclosure, and simple cancellation requirements in subscription services.⁵

Rather than making radical changes to the subscription marketplace, the FTC’s proposed amendments to its Negative Option Rule would cement and bring uniformity to existing statutes and rules that the Commission has relied upon for decades of enforcement actions targeting unfair and deceptive negative option practices. The FTC’s objectives in this proceeding include ensuring that compliance is achievable and recognizing that businesses have overlapping obligations. In fact, due to the proposed amendments’ closeness to existing interpretations of federal statutes, several consumer advocacy organizations have

² “Subscription Service Statistics and Costs,” *C+R Research*, May 18, 2022.

<https://www.cresearch.com/blog/subscription-service-statistics-and-costs/>

³ “Survey from Chase Reveals That Two-Thirds of Consumers Have Forgotten About At Least One Recurring Payment In The Last Year,” *Chase*, April 1, 2021. <https://media.chase.com/news/survey-from-chase-reveals>

⁴ “Restore Online Shoppers’ Confidence Act,” *Federal Trade Commission*, 2010.

<https://www.ftc.gov/system/files/documents/statutes/restore-online-shoppers-confidence-act/online-shoppers-enrolled.pdf>

⁵ “Enforcement Policy Statement Regarding Negative Option Marketing,” *Federal Register*, November 4, 2021.

<https://www.federalregister.gov/documents/2021/11/04/2021-24094/enforcement-policy-statement-regarding-negative-option-marketing>

urged the Commission to strengthen the Negative Option Rule even further, including recommending a requirement for notification prior to each recurring charge.⁶

The FTC drafted the amendments to be minimally prescriptive, formalizing requirements around consent, disclosure, and simple cancellation in ways that easily fit into current business practices, particularly regarding recordkeeping and electronic disclosure. Even the addition of the “click-to-cancel” requirement itself is merely a requirement to simplify the cancellation process. This provision would likely save businesses in design costs compared to exit processes which are intentionally complex and deceptive. A singular, click-to-cancel mechanism is undoubtedly easier for sellers to create and implement, given the lack of consumer manipulation required.

The proposed amendments do not add substantial document and disclosure requirements that would dramatically increase costs. Rather, they seek to clarify that certain misrepresentations are prohibited, provide full transparency to consumers regarding cancellation options, and limit the manners in which businesses can intervene to prevent cancellations. Consumer advocates have strongly supported the FTC’s proposed amendments to the Negative Option Rule and reiterate this support for consideration by the Hearing Officer in these proceedings.⁷

II. Conclusory Statements About Compliance Costs Are Not a Reason to Stall This Rulemaking.

The Interactive Advertising Bureau (IAB)⁸ relies primarily upon its assertion that it will incur compliance costs as a reason to stall the rulemaking. The expert report submitted by IAB on January 30 is notably devoid of any actual, identifiable cost or calculation that would

⁶ “NCL urges FTC to strengthen consumer protections for subscriptions,” *National Consumers League*, June 26, 2023. <https://nclnet.org/urges-ftc-to-strengthen-consumer-protections-for-subscriptions/>

⁷ “Comment from National Consumers League et al,” *Regulations.gov*, June 28, 2023. <https://www.regulations.gov/comment/FTC-2023-0033-0880>

⁸ IAB’s members include big tech companies (Google, Instagram, Snapchat), digital streaming services (Netflix, Philo, Spotify), and news and media corporations (Disney, ESPN, Fox News). “Member Directory,” *Interactive Advertising Bureau*. <https://www.iab.com/member-directory/>

allow the Hearing Officer to evaluate its claims. Regardless, even if IAB members were to incur compliance costs, it is crucial for the Hearing Officer to recognize that any changes that may be required due to the proposed amendments would be aimed at eliminating deceptive acts and practices that hinder the ability of consumers to cancel negative options. Using unfair and deceptive methods to impede consumers' ability to cancel unwanted services are violations of law—any cost to ensure that practices are not deceptive is simply the cost of doing business.

Failing to conform to the law places companies like those who comprise IAB's members in jeopardy of an enforcement action as they would be in violation of the FTC Act's general prohibitions against unfair and deceptive conduct. In the Commission's negative option case against Commerce Planet, the district court found that the company's landing page and "Terms of Membership" were deceptive because they were designed to hide the fact that consumers were unknowingly signing up for a continuity plan. *FTC v. Commerce Planet*, 878 F. Supp. 2d 1048 (S.D. Cal. 2012); *affd.*, 815 F. 3d 593 (2016). The Court said this:

[T]he overall, net impression from the content, layout, and design of the webpages is that consumers are ordering a free kit on how to sell goods on eBay with payment of a small shipping and handling fee, not that they are subscribing to a negative option plan. It is also apparent that the disclosure—by its placement, wording, colorization, spacing, and size of the text—was designed not be clear and conspicuous, but rather to mask information about OnlineSupplier's continuity program without entirely omitting the information. Such a method of disclosure is inadequate because it simultaneously conceals, obscures, and suppresses the very information it purports to convey. This misrepresentation is undoubtedly material because the information about a free kit goes to the cost of the product, an important factor in a consumer's decision on whether or not to purchase a product. See [Cyberspace.com](#), 453 F.3d at 1200. The notion that consumers will get a free kit makes it more likely that they will unwittingly provide their credit card

information, thinking they are only paying for shipping and handling, when in fact, they are obligating themselves to pay a subscription fee for the continuity program. *Id.* at 1067-68.

Had the owners of Commerce Planet not buried or omitted the terms and conditions that enable consumers to cancel their negative options, the conduct may not have been found to be deceptive. The amendments to the Negative Option Rule seek to underscore longstanding acknowledgments that this type of conduct is prohibited.

Notably, the FTC crafted its proposed amendments to be minimally prescriptive, allowing for flexibility in how businesses comply with the rule. This makes any forecasting of particular costs difficult at this point. Despite having had nearly one year since the FTC published its notice of proposed rulemaking (“NPRM”), requesting informal hearings, and commissioning two experts to write a report, IAB has failed to articulate any identifiable cost or expense and instead relies on conclusory statements to undo an entire rulemaking. It falls far short of establishing any basis for striking the Commission’s proposed amendments.

The FTC’s proposed changes to its Negative Option Rule are also not a radical departure from how companies are required to operate. Many platforms complaining of the potential expense of compliance with the FTC Act adhere to the European Union’s General Data Protection Regulation, which took effect in 2018.⁹ Additionally, many of these platforms abide by the California Consumer Privacy Act of 2018.¹⁰ Those statutes required extensive changes to protect individual privacy rights. It is likely that most, if not all, of the companies that are now complaining about the potential expense to bring their platform into compliance with the FTC Act were able to comply with these other consumer protection statutes.

⁹ “What is GDPR, the EU’s new data protection law?” *GDPR.eu*, <https://gdpr.eu/what-is-gdpr/>

¹⁰ “California Consumer Privacy Act (CCPA),” *State of California Department of Justice*, May 10, 2023. <https://oag.ca.gov/privacy/ccpa>

III. Industry Failure to Fully Participate in Past Public Comment Opportunities Is Not the Fault of the Commission

In April 2023, the Commission provided a 60-day period for all stakeholders, including IAB and the International Franchise Association (“IFA”), to submit relevant data and information to guide the rulemaking. IAB submitted public comments—both as an individual organization¹¹ and in coalition with other industry groups.¹² Neither of these submissions contained specific evidence or data that would have informed the FTC in drafting its final rule, evidence and data which the Commission explicitly requested in its NPRM. Instead, IAB chose to submit a report to the presiding officer less than 24 hours before the January 31, 2024 informal hearing. Similarly, IFA submitted comments in response to the 2023 NPRM without any evidence or data to inform the FTC’s effort.¹³

Although the FTC has provided two public comment opportunities (including an advance notice of proposed rulemaking—a stage that many other agencies do not provide) and has granted industry representatives’ requests for previously unscheduled hearings, these representatives continue to push for unnecessary delays and special accommodations. Their failure to adequately engage with the standard regulatory process does not warrant the delay of consumer protections for millions of individuals nationwide. The Commission must protect the public interest and continue with its amendments to the Negative Option Rule without delay.

IV. Conclusion

The Hearing Officer should regard IAB’s expert reports with skepticism. Negative option practices are a grave concern for consumers and public interest advocacy groups who seek to ensure fairness and transparency in the marketplace. The undersigned groups have

¹¹ “Comment from Interactive Advertising Bureau,” *Regulations.gov*, June 29, 2023.

<https://www.regulations.gov/comment/FTC-2023-0033-1000>

¹² “Comment from Coalition comments from U.S. Chamber, ITI, SIIA, DSA, CCIA, and IAB,” *Regulations.gov*, June 28, 2023. <https://www.regulations.gov/comment/FTC-2023-0033-0884>

¹³ “Comment from International Franchise Association,” *Regulations.gov*, June 28, 2023. <https://www.regulations.gov/comment/FTC-2023-0033-0856>

supported the FTC's efforts in this regard and urge the Hearing Officer to recognize IAB's biased report for what it is: an attempt to stall a rulemaking that might jeopardize ill-gotten profits. Potential costs of ensuring that businesses do not defraud consumers and injecting simplicity into processes frequently riddled with dark patterns is hardly a reason to stall the FTC's efforts. Rather, they underscore the need to advance the proposed amendments.

The undersigned consumer advocacy organizations appreciate the opportunity to provide input to the Commission as it finalizes these commercial safeguards. We strongly support the FTC's efforts on this issue and urge the Commission to strengthen its Negative Option Rule even further. The Commission should conclude these redundant oral hearings as quickly as possible and move forward with its work to protect consumers and the marketplace.

Sincerely,

Consumer Federation of America
National Consumer Law Center (on behalf of its low-income clients)
National Consumers League